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**CONSIDERATION OF THE REPORTS AND RECOMMENDATIONS OF THE
MARINE ENVIRONMENT PROTECTION COMMITTEE**

Implementation of the Ballast Water Management Convention

Note by the Secretary-General

SUMMARY

<i>Executive summary:</i>	This document invites the Assembly to give consideration to a proposed draft Assembly resolution recommending that, for a limited period of time, States should not require compliance with the standard contained in regulation D-2 of the BWM Convention
<i>Action to be taken:</i>	Paragraph 23
<i>Related documents:</i>	MEPC 56/23, MEPC 56/2/6, MEPC 55/23, BLG 11/16, BLG 11/4/3, BLG 11/4/14

Introduction

1 This document invites the Assembly to give consideration to a proposed draft Assembly resolution recommending that, for a limited period of time, States should not require compliance with the standard contained in regulation D-2 of the BWM Convention.

2 Should the Assembly decide, in principle, in favour of such action and request Committee 2 to proceed accordingly, it might be advisable for interested Members to consider including, in their national delegations to the Assembly, experts to assist the Committee in its deliberations.

Background information

3 The International Conference on Ballast Water Management for Ships, convened in February 2004, adopted the International Convention for the Control and Management of Ships' Ballast Water and Sediments (BWM Convention), together with four conference resolutions. Conference Resolution 4 recommends that the MEPC reviews the regulations of the Annex to the Convention not later than three years before the earliest effective date of the standards set forth in regulation D-2. A similar provision is embedded in the Annex to the Convention under regulation D-5 and requires MEPC to undertake a review to determine, *inter alia*, whether

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appropriate technologies are available to achieve the standard in regulation D-2. A first review, conducted at MEPC 53 (in July 2005), was not fully conclusive and called for an additional review at MEPC 55 (in October 2006).

4 MEPC 55 noted the conclusions of the Ballast Water Review Group that type-approved ballast water management systems would probably be available for installation prior to the first application date of the BWM Convention (1 January 2009). The Committee noted, however, that the installation of type-approved ballast water management systems on ships already contracted to be constructed in or after 2009 may not be feasible or only possible at excessive cost and/or delay in delivery.

5 As requested by the MEPC, the Legal Office of the Organization reviewed two options to minimize the negative consequences caused by the possible delay in the development of type-approved systems identified during MEPC 55, and found them not to be viable. Furthermore, the Legal Office was of the view that (BLG 11/4/3) the preferred and most appropriate legal option to address this situation should be the adoption of a Protocol to the BWM Convention. If, however, Member States were not supportive of such a Protocol, the Legal Office suggested a number of possibilities, which could be further explored by the Ballast Water Working Group established at BLG 11 and by the Committee at its 56th session. Among the three possibilities, the adoption of an MEPC resolution calling on States not to enforce the first compliance date for a limited period of time appeared to receive support at BLG 11. Such a resolution would declare that circumstances have rendered the operation of the 2009 date impossible and could contain a recommendation that countries depositing an instrument of ratification or accession should submit a declaration concerning the postponement of the first application date of the D-2 standard contained in regulation B-3, paragraph 3. It was emphasized that such a resolution would need to be adopted on a consensus basis, otherwise Parties which have not agreed to it, could reject the understanding when the Convention comes into force.

6 Expressing its support for the possibility of an MEPC resolution along the line suggested by the Legal Office, which was seen as a pragmatic solution, the ICS observer offered a draft text for consideration with a view to adoption by MEPC 56.

7 Noting the support for an MEPC resolution on this matter and being aware that the Committee would consider further proposals for approval of ballast water management systems at its next session, BLG 11 agreed to invite MEPC 56 to consider the text proposed by ICS as a basis for further development of such a resolution, should the availability of technologies still be a matter of concern at that time.

8 Having considered the legal opinion provided by the Legal Office of the Organization, BLG 11 noted that, if the conditions for entry into force are not met by the end of 2007, the Convention was bound to enter into force after 1 January 2009, which, in turn, would shift the first application date of the D-2 standard to the date of entry into force of the Convention. During the review of the draft report of the Sub-Committee, some delegations could not agree with the view above and suggested that it would be beneficial if this aspect could be further examined by MEPC 56. Additional advice on this particular matter was also sought from the Legal Office of the Organization.

9 In providing further advice to MEPC 56, the Legal Office was of the view (MEPC 56/2/6) that the BWM Convention could not impose retroactive rights or responsibilities. The effect of having the Convention come into force after the first date of compliance with the standard in regulation D-2 is for that date to slip forward to the date of entry into force of the Convention. There would be no effect on subsequent application dates contained in regulation B-3, unless the

entry into force date for the Convention slipped past those dates. In support of this view, the Legal Office quoted Article 28 of the Vienna Convention on Non-retroactivity of treaties, which reads as follows:

“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to the party.”

10 Having considered document MEPC 56/2/6 (Secretariat), the Committee, at its fifty-sixth session, in July 2007, was unable to endorse the advice on retroactivity provided by the Legal Office and decided that the non-retroactivity provisions contained in the Vienna Convention on the Law of Treaties are not relevant for the discussion on availability of technologies as this was not a matter of retroactivity.

11 Having noted the support of the BLG Sub-Committee for an MEPC resolution calling on States not to enforce the D-2 standard for a limited period of time, MEPC 56 instructed the Ballast Water Review Group to further consider the possibility of adopting such a resolution with a view to revisiting this matter after the consideration of the report of the Review Group on the availability of ballast water treatment technologies.

12 In this respect, one delegation stated that, as a Party to the BWM Convention, it could not agree with a draft MEPC resolution, as suggested, and consequently placed a reservation concerning the possible issuance of such a resolution.

13 Having concluded that a limited number of technologies will be available to meet the first implementation date of the BWM Convention, the Review Group remained concerned that the capability of all ships subject to regulation B-3.3 of the Convention to meet the D-2 standard in 2009 could be affected by procedural and logistical problems that include:

- whether Type Approval test sites are being developed, are up and running and whether commercial sites have capacity for testing the number of technologies being developed;
- whether a system can actually overcome the practical difficulties of moving from Basic Approval to Final Approval;
- the lower than expected participation in the approval process under Procedure (G9) by manufacturers and Administrations;
- the slow pace of ratification caused by the lack of a complete set of Guidelines and/or the lack of approved technology; and
- possible limitations and delays caused by the timing of MEPC and the GESAMP-BWWG's consideration of Ballast Water Management Systems that use Active Substances for Basic and Final Approval.

However, the Group believed that all ships subject to regulation B-3.3 of the BWM Convention would be able to meet the D-2 standard by 2010 or 2011.

14 Having recalled that a resolution calling on States not to enforce the first compliance date for a limited period of time would need to be adopted on a consensus basis and being aware of the reservation placed by one delegation, the Review Group did not pursue this option further and decided to seek guidance from the Committee on other possible ways to provide the certainty requested by the shipping industry and an acceptable mechanism to ensure that ship owners facing these problems are not legally penalized.

15 MEPC 56 noted (see paragraph 2.45.27 of document MEPC 56/23) the conclusions of the Review Group regarding the concerns of the shipping industry and, recognizing that most of the delegations which took the floor were of the view that moving forward the first date of application of the D-2 standard by two years would be more appropriate, agreed, subject to appropriate reviews, to consider 1 January 2011 as the new possible D-2 application date.

16 Furthermore, the Committee invited Members and observers to submit documents to MEPC 57 aimed at providing guidance on how to address the concerns and, in particular, how to ensure that shipowners facing problems related to unavailability of ballast water treatment technologies are not legally penalized, with a view to taking a final decision at that session (see paragraph 2.45.28 of document MEPC 56/23).

Status of the BWM Convention

17 In accordance with article 18, the 2004 BWM Convention will enter into force twelve months after the date on which not less than thirty States, the combined merchant fleets of which constitute not less than thirty-five per cent of the gross tonnage of the world's merchant shipping, have either signed it without reservation as to ratification, acceptance or approval, or have deposited the requisite instrument of ratification, acceptance, approval or accession.

18 At the time of writing, the Convention has been accepted by ten States representing 3.42 per cent of the world fleet's gross tonnage, and the Secretary-General wishes to take this opportunity to express appreciation to those Members who have acted promptly to accept the Convention or are in the process of doing so.

Proposal

19 In view of the envisaged impossibility of the BWM Convention entering into force before 1 January 2009, the Secretary-General is anxious to avoid a situation whereby:

- Parties to the Convention may, although having acted promptly to ratify it, consider themselves disadvantaged vis-à-vis non-Convention Parties;
- a situation emerges, which might not be conducive to non-Convention Parties accepting the Convention, thereby delaying further its entry into force; and
- the industry (including owners, shipbuilders and equipment manufacturers) may be confused as to what standards apply, on which ships and as from when.

20 At the same time, the Secretary-General is committed to promoting the implementation of the BWM Convention as soon as the relevant technology is available, in the wider interest of protecting the marine environment.

21 Furthermore, he considers that, if the matter were left to MEPC 57 (in March-April 2008) to resolve, it would be too close to the 1 January 2009 stipulated deadline and too late for the required clarity, certainty and confidence over the issue in hand.

22 To that effect, a draft Assembly resolution (the substance of which is contained in the recommendations of its operative paragraphs 2 and 3) has been worked out, which, following consultations with the Chairman of the MEPC, the Secretary-General submits to the Assembly for consideration and adoption.

Action requested of the Assembly

23 The Assembly is invited to consider the proposal made in paragraph 22, together with the annexed draft Assembly resolution; and decide as it may deem appropriate.

ANNEX

DRAFT ASSEMBLY RESOLUTION

**APPLICATION OF THE INTERNATIONAL CONVENTION
FOR THE CONTROL AND MANAGEMENT OF SHIPS' BALLAST WATER
AND SEDIMENTS, 2004**

THE ASSEMBLY,

RECALLING Article 15(j) of the Convention on the International Maritime Organization concerning the functions of the Assembly in relation to regulations and guidelines concerning maritime safety and the prevention and control of marine pollution from ships,

RECALLING FURTHER the adoption by the International Conference on Ballast Water Management for Ships, held at the Organization's Headquarters in 2004, of the International Convention for the Control and Management of Ships' Ballast Water and Sediments (hereinafter referred to as "the Convention"),

RECALLING ALSO Article 2, paragraph 4 of the Convention, which requires Parties to endeavour to co-operate for the purpose of effective implementation, compliance and enforcement of the Convention,

DESIRING to ensure that the Convention enters into force without further delay so that the marine environment benefits, as soon as possible, from its wide and effective implementation,

BEING CONSCIOUS of the need to provide certainty and confidence in the application of the Convention, thereby assisting shipping companies, ship owners, managers and operators, as well as the shipbuilding and equipment manufacturing industries, in the timely planning of their operations,

BEING CONCERNED that the reported current uncertain state of ballast water treatment technologies to meet the standards set out in the Convention may act as an impediment to its acceptance by States, thus delaying its entry into force in the foreseeable future,

BEING FURTHER CONCERNED that ships should not be subject to the requirements of the Convention before the Convention has entered into force and the Marine Environment Protection Committee has determined that adequate technology is available to achieve the standards set forth in the Convention,

1. CALLS ON States, which have not yet done so, to ratify, accept, approve or accede to the Convention as soon as possible;
2. RECOMMENDS that States, henceforth ratifying, accepting, approving or acceding to the Convention, accompany their instrument of ratification, acceptance, approval or accession with a declaration or otherwise communicate to the Secretary-General their intention to apply the Convention, on the basis of the following understanding:

"Ships constructed [in 2009] [in or after 2009 but before 1 January 2011] [in or after 2009 but before the date on which the Convention enters into force, provided this happens before 1 January 2014], with a ballast water capacity of less than 5,000 cubic metres, entitled to fly the flag of another State, will not, while in our national ports or offshore

terminals, be required or expected to comply with the standard set out in regulation D-2 of the Annex to the Convention.”

3. RECOMMENDS FURTHER that, at their earliest convenience, States Parties to the Convention make the above-mentioned declaration or otherwise notify the Secretary-General of their intention to apply the Convention, in accordance with the understanding contained in paragraph 2;

4. REQUESTS the Secretary-General to inform all Member States, and Parties to the Convention which may not be Members of the Organization, of any declarations or communications received from States pursuant to this resolution;

5. REQUESTS the Marine Environment Protection Committee to keep this resolution under review in order to determine whether the recommendations in paragraphs 2 and 3 should be revised or withdrawn; and to inform the Assembly as appropriate.
